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JOAN KENNEDY TAYLOR, EDITOR

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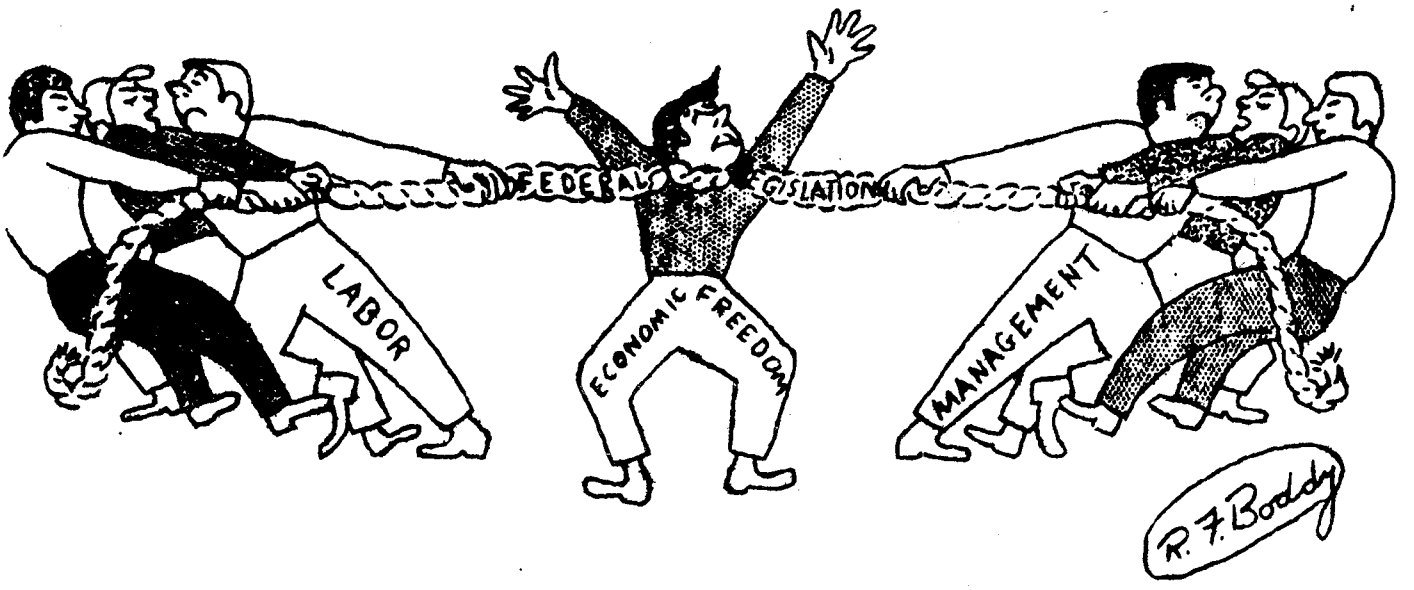

All you need is a little pull in Washington

LABOR LEGISLATION: THE SHOP THAT GOVERNMENT BUILT

Recently, there has been a renewed interest in a not-so-new issue: right to work laws. The Taft-Hartley Act of 1947 provided that any state could pass a "right to work" law, declaring that within its confines: 1) a labor union may not establish a closed shop which requires that all workers be members of its organization, and 2) an employer may not deny a worker employment on the basis of his membership or non-membership in a union. Right to work laws have been in existence since 1947, when Florida passed the first one. To date, nineteen states have such statutes. They have had prominence in the news in recurring spurts over the past 18 years, sometimes provoking much excitement, other times taking only a minor place, but always stimulating controversy in the over-all economic scene. The present resurgence of the subject was prompted by President Johnson's advocacy of the repeal of right to work laws and,

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indeed, the first step in this direction took place on Wednesday, July 28, 1965, when the House of Representatives voted 221 to 203 to repeal them. If the bill "sails through the Senate without a hitch", as labor leaders are predicting, it will be a victory for which unions have spent 18 years and over 18 million dollars.

The controversy over right to work is a reflection of the battle for so-called "economic power" that has been going on since the government began manipulating labor-management relations. Even in the days of the 19th century when the market was comparatively unhampered, the United States economy was not totally free from government interference. Government economic planners have constantly sought to improve the lot of all by restricting the actions of some. It is therefore not surprising that in studying the background of labor unions in this country, one encounters a long chain of legal actions allegedly designed to create an economy that will work to the advantage of everyone.

It is also not surprising that out of an economy where restrictions on activities in the marketplace are considered necessary, an antagonism has arisen between the men who are seeking jobs, and the men who are seeking workers. So entrenched has this antagonism become, that it is considered an inherent factor of the economy. It is claimed that one group can benefit only at the direct expense of the other, and each has sought legal backing to insure an advantageous position. The story of labor-management relations reads like a legal tug-of-war.

Early labor laws in this country were in the form of court decisions based on local conspiracy laws of the individual states. The tug-of-war began with labor on the losing end. Unions were not popular and charges of criminal conspiracy were often brought against them, the charges grounded in what the courts called "economic and social pressures" used to "compel" men to join their associations. In addition, the goals of labor unions were looked upon by the courts as infringements of property rights--that is, the rights of entrepreneurs to manage their businesses as they chose. The legality of unionism remained in considerable doubt until 1842 when a court decision held that unions were not unlawful, per se, but that their legality depended on the court's judgment of the objectives of their activities.

As unions gained more popularity, the idea that all labor unions were criminal conspiracies fell increasingly out of favor. The courts searched for another suppressive device, and came up with one which effectively prevailed for over forty years--the labor injunction. This is a stop-order issued to the union, to prevent "illegal strikes"--strikes which, in the court's judgment, would cause irreparable damage to the employer. In deciding what constituted an illegal strike, the individual judge too often based his conclusion on his own particular views of proper labor union objectives and tactics. This was flagrantly non-objective and was even referred to by leading lawyers as "government by injunction".

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Strong objection led to the first federal anti-injunction law, passed in 1914. Written into the Clayton Act, passed that year, was a long list of legal strike activities which were to be totally immune to injunction proceedings. Labor thought the Clayton Act such a victory that Samuel Gompers and other labor leaders hailed it as the Magna Carta of American labor. Satisfaction soon gave way to disillusionment, however, when the Supreme Court had the last word on what the Clayton Act meant. The listing of legitimate strike activities was qualified by the provision that they be conducted "peaceably" and "lawfully"--and, said the court, what constitutes "peaceable and "lawful" activity is still up to us. Consequently, the intent of the Clayton Act was not fully realized, and labor did not benefit much from its passage.

Then, in 1932, Congress passed the Norris-La Guardia Anti-Injunction Act, an extensive statute designed to plug up the holes in the Clayton Act. The new law strictly barred the courts from preventing certain activities such as collectively refusing to work, urging others not to work, and publicizing a dispute with employers. It also tightened the procedure for issuing injunctions, requiring that the employer first prove that he was innocent of violating any labor law, and that the police were unable to protect his property in the case of a strike. The effect of the Norris-La Guardia Act was to leave the unions much freer to exert their "full economic power" against the employer, by removing previous restraints on their activities. It placed labor nearer to the winning end of the power struggle. In the next few years, unions gained a firmer hold than ever, and in 1935, they were granted a sweeping victory with the passing of the National Labor Relations Act--also known as the Wagner Act after its main sponsor. The Wagner Act was the most important New Deal labor legislation, and to understand its provisions, the definitions of some basic terms are in order:

1. an open shop is a place of business where union and/or non-union employees may be hired.
2. a union shop is a place of business where any employee must either be a union member when hired, or agree to join the union after a short period of time (usually 30 days).
3. a closed shop is a place of business where only union members may be employed--that is, every worker must belong to the union before he is hired.
4. collective bargaining refers to the process by which labor and management reach union contracts or "collective agreements". The contract is negotiated by one or more representatives on behalf of the whole union involved in the arrangement, and regulates conditions of employment such as wages, the amount of work produced in a certain amount of time and, standards of job promotion.

The purpose of the Wagner Act was to insure 1) the organization of strong and stable unions as quickly as possible and 2) the regulation of terms and conditions of employment, thereafter, by collective bargaining. The statute clearly intended that in order to allow unionism to spread throughout the economy, government should restrain "coercion" by employers while closed shops were being formed. The primary goals of

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the law were backed up by the creation of the National Labor Relations Board (NLRB), a panel of arbiters to hear and pass decisions on complaints brought against management by labor in regard to certain actions which the Wagner Act labelled "unfair labor practices." Such practices included a) any interference with attempts of employees to organize into unions; b) any discrimination against any employee because of an interest in unions; c) refusal to bargain "in good faith" with the union representing the employer's workmen. The union organizer was given free rein in presenting his case to the workers while the employer was forced to remain on the sidelines. The Wagner Act took the position that whether or not a worker wished to join a union was none of the employer's business. Once a group elected to have a closed or union shop, or if a majority of workers in an open shop were union members, the employer was required to deal exclusively with union representatives, and could not hire substitute workers in the event of a strike. Labor was empowered to bring management before the Board for any questionable activity, and a business owner no longer had any control over his employees' union affiliations. Any resistance on his part was subject to review by the NLRB, and their decisions granted greater and greater power to the labor unions.

In 1947 when the Taft-Hartley Act was passed, there was a dramatic change in the direction of the struggle. The specific intention of the statute was to curb some of the power granted to organized labor by the Wagner Act, and it was denounced as a "slave-labor law" by union leaders everywhere. Those who supported the Taft-Hartley Act were convinced that it struck a fair balance of power between unions and employers, and claimed a need for federal regulation of union practices as well as employer practices. The range of the NLRB was extended to cover what the new law called "union unfair labor practices," allowing management to appeal to the Board in the same manner as labor and to file complaints against unions for certain "unfair" activities.

The other significant provision of the Taft-Hartley Act was to counteract the continued establishment and maintenance of closed and union shops. In Section 14(b), permission was granted to the individual states to pass right to work laws, which outlaw the closed and union shops. It was thought that by granting to the states this discretionary power, employers would be given freer rein in their relationship with organized labor. States which do not prohibit the closed shop in the form of right to work laws must accept their establishment, since Federal law allowing the practice has been upheld by the Supreme court. The Taft-Hartley Act, in general, and Section 14(b) in particular, clearly intended to benefit management, and has led to inevitable strong objections from the labor front.

The tug-of-war goes on. In spite of the Taft-Hartley Act, the NLRB has continued to rule in favor of labor. In the May 1965 issue of Nation's Business, Stuart Rothman, former general counsel for the National Labor Relations Board, outlined some of the acquired powers of the board in an article entitled, "Let's Stop Labor Board's Unfair Practices." The article states, "Organized Labor's leaders are

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having more and more to say about how you run your business as a result of National Labor Relations Board decisions. . . . They limit, for example, your right to: --Sell or close your business. --Move your business, or part of it, to another city. --Let out on contract any work you have been doing yourself. --Inform your employees of developments during union negotiations. --Use your own time and property to discuss union matters with your employees unless the union gets equal time and facilities to reply. . . . The Board has held in a number of cases that you must discuss with the union, in advance, management decisions which affect workers represented by the union. You must do this even though your decisions are motivated by sound economic and business reasons and not by any feelings against employees or union. . . . These decisions cover such vital and often necessarily confidential matters as selling, closing or moving your business, or part of it, and subcontracting. . . . Consider the impact of the Board's talk-with-the-union-first rule on business decisions which may demand complete secrecy, such as mergers or selling out."

In view of labor's increasing power, it is easy to see why the tug-of-war has centered around the right to work issue. Against an overwhelming battery of labor forces, management considers the right to work statutes the only existing weapons with which it can fight back. Economic theorists, business and labor leaders, and commentators have taken sides, and strong arguments are being fired back and forth.

Labor leaders, of course, favor a closed shop. They argue that where both union and non-union employees work in the same shop, and the shop is represented by the union, those who are not members reap all the benefits (pay raises, fringe benefits, etc.) of union membership without having to pay dues. Such non-union "beneficiaries" have been dubbed "free riders" by labor leaders. Auto union President Walter Reuther summarized their point of view in a statement printed in the New York Daily News, June 12, 1965. He said that Section 14(b) of the Taft-Hartley Labor Law is a "shabby symbol of anti-unionism, a legalized shelter for the free rider's 'right to shirk.'" A notable answer to the "free riders" concept was given by Barry Goldwater in a Senate speech in 1963. He said, "Any man who considers that he benefits from the union's activities certainly ought to pay. Those who do not think so should not be forced to pay. They are not free riders. They are captive passengers." The present Administration is on the side of labor in this issue; President Johnson has openly requested that Congress repeal right to work laws. David Lawrence, in his New York Herald Tribune column of May 26, 1965, quoted Labor Secretary Wirtz, who spoke for the President with the intent of fully explaining the Administration's reasons for sponsoring repeal of the laws. Mr. Wirtz concurred with the "free riders" idea and declared further, "There's no violation of freedom in a minority's having to accept the majority's fair judgment fairly arrived at."

Mr. Lawrence answers him: "The right of a majority in a private organization to make rules for its members is conceded. But to compel persons who do not wish to belong to a particular organization to pay dues to such a group involves a discrimination against dissenters." He is in favor of right to work laws on the grounds that

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they protect individual workers from coercive union practices.

Generally speaking, those who are in favor of right to work laws are small businessmen, Chambers of Commerce in various states, and the National Association of Manufacturers. They argue that right to work laws protect workers from being forced into a closed shop, and give the employers a just weapon against unionization.

But, what do these laws amount to in practice? Instead of forcing the employer to have a closed shop, it forces him not to. Instead of forcing the worker to belong to a closed shop, it forbids it. Right to work laws are a means of legal coercion, infringing on the rights of individuals--and for this reason should be abolished. The so-called benefits of these laws can be realized only at the expense of the rights of some workers and employers to associate with one another as they choose. To put it another way, right to work laws represent the other side of the National-Labor-Relations-Board coin. The National Labor Relations Board enforces the closed shop, which forbids employers to hire non-union workers and makes it impossible for non-union workers to find jobs. Right to work laws prevent the employer from voluntarily agreeing with the union to have a closed shop.

Those who argue for and against right to work laws would certainly appear to be opposing factions, as indeed they are on this concrete issue. But, essentially, their debate boils down to two teams engaging in the same familiar power struggle. They share the long-established premise that labor and management are necessarily warring factions--that in order to create a "just balance of power," the alternatives are either to coerce the workers, to coerce the employers, or as in the case of right to work laws, to coerce both. Both camps operate on the premise that "economic power" is a legal arsenal over which the federal government has control.

Advocates of right to work are so concerned with preventing union monopoly and coercive membership that they forget, for one thing, about the employer's right to hire anyone he wants, by any standards he chooses. These standards might conceivably include union membership. It is difficult to imagine any employer preferring a closed shop in today's context, but it is certainly possible in principle. In principle, a proper labor union is a voluntary association of men with a common purpose, be it bargaining for higher wages, planning a fund for the old age of members, organizing a bowling team for their leisure hours, or setting specific standards in its industry. It could well be the case that a union in a certain field could achieve such a high reputation that membership in it would be a badge of excellence. It might matter very much to an employer that an employee belong to such a respected organization.

Or, suppose the employer has quite another reason for wishing to restrict his workers to a particular union, a reason apart from their ability. Suppose the union assumes the job of providing so-called "fringe benefits," such as health insurance and retirement benefits, freeing the employer from having to consider this issue at all, and freeing him from the costly bookkeeping that goes with it.

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No matter what reason an employer might have for wishing to hire only those from a particular association, he should be free to do so. He has a wage to offer for a job he wants done. He has a right to set his own terms and look for someone willing to meet them. If he cannot find such a person, he must choose between modifying his terms or withdrawing his offer.

The same principle applies when viewed from the side of the employee. He has a skill or service to offer in exchange for a salary--a monetary equivalent. He, too, is free to set terms and must seek out a voluntary trader--an employer. He may think he can strike a better bargain with union representation. Both parties must reach an agreement to effectuate the trade, allowing the transaction to be in the maximum interest of each. Neither has the right to coerce or restrict the other to derive benefits for himself. As soon as one or both parties is coerced, the concept of trading no longer applies. This is what is meant by a free market, as it pertains to workers and employers. It is the proper answer to the idea that labor and management are inherently antagonistic.

It is precisely the issue of coercion that is the heart of the problem. As long as men--labor, management, government--all men, do not recognize that it is improper to force some men to relinquish their rights to other men, the tug-of-war will continue. Right to work laws, along with all labor legislation, are basically coercive devices to control the economy, which means to control the actions of men in the marketplace. In the case of all government intervention into the economy, the attempt to secure certain guarantees to some can be accomplished only at the sacrifice of others, resulting in the infringement of someone's liberties, and the further destruction of the concept of individual rights. It is not the place of the government to hold:

That a man has the right of association--and then tell him whom to associate with.
That a man has the right of property--and then tell him how to use it.
That a man has the right to pursue goals--and then tell him what goals to pursue.
That a man has the right to his life--and then tell him how to live it.

--Lois Roberts

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REVIEWS

REASON, IRRATIONALITY, AND KENNEDY'S METHOD

The Pursuit of Justice, by Robert F. Kennedy, edited by Theodore Lowi, Harper & Row, New York, 1964.

In a short foreward, Mr. Lowi describes the construction of the book as follows: "What I have done here is to develop his [Mr. Kennedy's] public statements into a series of twelve essays--'position papers' they might be called in government. Sometimes this meant combining materials drawn from several speeches or statements before congressional committees. But at all times the ideas and positions are those of Mr. Kennedy. Mr. Kennedy has written a new first chapter for this volume." In short, we can assume that Mr. Kennedy fully sanctions the positions advocated and the arrangement of materials in this book, and we can treat it accordingly.

A quick reading might lead one to believe that the book is of no particular importance, since there is little that is new in it. Most of the ideas are as old as the present "liberal" trend. For example, Mr. Kennedy believes that, the problem of production having been solved, all we now have to do is solve the "problem" of "distribution." He favors the Peace Corps and its domestic counterpart, unreservedly backs the Civil Rights Act of 1964, opposes extremism, and believes that "Communism must be defeated by progressive political programs which wipe out the poverty, misery and discontent on which it thrives."

However, Mr. Kennedy is one of our major political figures, and if what is said of his ambitions is true, aspires to the highest office in the land. He may even achieve it. Therefore, the insight into his mental processes given us by a book of this kind is not only interesting but vital. How does he approach ideas, what are his methods of arriving at conclusions, how does he prove his points and justify his proposals?

Perhaps the best single expression of how Mr. Kennedy's mind works is to be found in the chapter dealing with extremists of both wings. He points out that they can be a short-term danger (though not a long-term one, because the "consensus" has too much "good sense".) Then he says:

"The answer to these voices cannot simply be reason, for they speak irrationally. . . . [The answer] must come from an informed national consensus which can recognize futile fervor and simple solutions for what they are, and reject them quickly." (Italics mine.)

What is this answer that cannot simply be reason? "Ultimately, America's answer to the intolerant man is diversity. . . . Many voices and many views have combined into an American consensus, and it has been a consensus of good sense."

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What is important is that Mr. Kennedy is attempting to pose a third alternative to reason and irrationality. Reason (in this context) may loosely be defined as a mental process which consists of exercising good judgment, being logical, etc. Irrationality does not stand in the same relation to reason as red does to green. Irrationality is not a different kind of mental process, it is the lack of that particular mental process which we call reason or rationality. That is: it is the lack of reason, the failure to exercise good judgment, the failure to be logical. Whatever answer you pose to the problem of extremists, whether it be diversity, a consensus, gobbledegook, demagoguery, emotionalism, argument, or brute force, either it rests on reason, or it does not. There is no third alternative.

Why is this important? Because once you allow yourself to operate on the premise that there is a third alternative which is as good as reason (and evidently even better, since it can answer irrationality, which reason supposedly cannot) you will not apply reason with anything approaching intransigence in explaining the problems of the day, explaining and justifying your solutions--or even in thinking them out in your own mind. Working on that premise, why should you?

Now, while I certainly will not agree as to the infallibility of the American consensus, it is true that people generally do not wish to be irrational. Crackpots cannot impede any rational course in government unless they can convince a pretty large number of people that it is, in fact, an irrational course. If rational men in government take care to show exactly how and why the government's policies are the right ones, crackpots will find precious little support. A consensus, informed in reason will probably come up with the right answers (though it would be dangerous to rely on it as an absolute), but you cannot substitute the consensus for reason.

Why should Mr. Kennedy feel it necessary to find a substitute for reason? Let's look further.

The chapter from which I have quoted deals with various kinds of crackpots, though they are far more euphemistically described. Consider Mr. Kennedy's use of such euphemisms as "futile fervor" and "simple solutions." Consider what they imply. Futile fervor means fervor that doesn't do you any good. There is nothing inherently wrong with it. You might feel a considerable degree of fervor in your desire for help if you are being robbed, but unless a policeman comes along in time, it might be utterly futile. What Mr. Kennedy means is not futile fervor but fanaticism, that kind of fervor that is blind and unreasoning. By softening the term in this manner, he subtly implies that success in getting your ideas accepted is one of the factors which determines whether or not those ideas are valid.

As for "simple solutions," I think it unlikely that Mr. Kennedy is using the word "simple" in the sense of moronic, which usage is pretty uncommon these days, but this seems to be what he is getting at. However, his decision to use "simple" instead of "oversimplified" implies that simplicity in a solution is somehow bad in

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itself. In fact, many problems, even complex ones, do have fairly simple solutions, and this is true even in a bureaucracy, where the tendency is to overcomplicate rather than to oversimplify.

In the chapter Mr. Kennedy wrote especially for this book, he traces his reasons for entering public service, and gives a sort of run-down of his beliefs. Included are the following statements:

"Whatever secures for a man his own individuality is his unalienable right. And it was 'to secure these rights' says the Declaration of Independence, that 'Governments are instituted among men.'"

"I believe that, as long as a single man may try, any unjustifiable barrier against his efforts is a barrier against mankind."

"I believe that, as long as there is plenty, poverty is evil. Government belongs wherever evil needs an adversary and there are people in distress who cannot help themselves." (Italics mine.)

While these statements are not labelled as principles, Mr. Loud tells us (presumably with Mr. Kennedy's consent) that the essays in this book are position papers. It is therefore reasonable to assume that these statements are statements of principle.

To begin with, what does Mr. Kennedy mean by "individuality"? The implication, conveyed by the way he uses the quotation, that the writers of the Declaration of Independence would agree with his use of this word indicates a certain carelessness. "Individuality" is the kind of term our Founding Fathers tried not to use. According to the old rhyme, Lizzie Borden evidently believed that her individuality could only be secured with an axe. Perhaps, given one of the many definitions of that elastic word, she was right. Was it then her unalienable right to give her mother forty whacks?

If you put it to him in those terms, Mr. Kennedy would probably say he hadn't meant that at all. He might feel that this way of putting it was hair-splitting. But why use words in such a way as to leave so much room for misinterpretation? What was wrong with the words the Declaration of Independence used?—having quoted so much of it, why not go on and say "life, liberty, and the pursuit of happiness," instead of "individuality"?

As for the second example—"as long as a single man may try"—try what, for goodness' sake? It certainly is true that when you state a principle, you give a general statement rather than one involving specific individuals. ("John Smith had better not go around shooting people" is not the way you formulate a principle regarding murder.) However, you can't state a principle without referring to specific classes of actions—and "try" is so general it is frightening. Think of the vast

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number of mutually contradictory things a man may try. Think of Lizzie Borden trying like mad with her little axe!

Of course, it is "understood" that Mr. Kennedy means something like "try to live a good life." But is this so much better? Ask a liberal, a Communist, a conservative, a Catholic, a Protestant, a Jew, an atheist, and an agnostic to define "good life," and you may get seven different answers. Ask two people of each of these persuasions, and there is a distinct possibility that you will get fourteen different answers--and you will not have begun to scratch the surface of the diversity of ideas held upon that subject. To the extent that people form their ideas on such matters in terms of concretes instead of principles (perhaps the safer method in the face of "principles" like this one) you will get slightly different definitions from almost everyone you talk to. The definition of "unjustifiable barriers" must also rest on one's concept of the good.

Given only this as a principle, without a long list of concrete examples tacked on, how can anyone (even Mr. Kennedy's most faithful adherents) know whether or not he is properly practising what Mr. Kennedy is preaching? When you are setting forth what you consider to be a vitally important and highly idealistic political philosophy, clarity is vital.

As for the evil of poverty--again, there is some question about Mr. Kennedy's choice of words. Certainly, poverty is not a pleasant thing. And it is true that people occasionally use the word "evil" to refer to such impersonal misfortunes as cyclones and earthquakes. However, generally the word is understood to have moral implications. When you speak of evil, the first question that arises in the minds of most people is: Whose evil? Who is responsible? Who is guilty?

When a criminal robs someone, his victim's consequent poverty is the result of an immoral action. In a totalitarian society, the poverty of the citizens is the result of the immorality of the dictators. But in a free society, poverty is generally the result of numerous factors, no one of which is necessarily connected with any immorality at all.

From Mr. Kennedy's point of view, there is no real ambiguity here. He considers poverty evil in the sense of immoral, and this idea has the same base as his view that all we need to do is solve the "problem" of "distribution." It is the idea that there is only so much wealth in the world, and that the only fair thing to do about it is divide it up into more or less equal shares. If one person has conspicuously more than another (even though he may have come by it honestly) there must be some immorality involved.

This is completely untrue. Wealth, apart from raw materials as they are found in nature, is created. The raw materials that go into detergents, antibiotics, and TV sets had little or no value to primitive man. Long chains of products and processes had to be invented before they attained their present value. Even with the necessary knowledge, these raw materials would have little value without men to invest

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in and manage the production of products using them, and without men to perform the physical labor of production. In a free society, each man involved in the production of a product other men want and will pay for is producing his own wealth. This is true whether he invents the product, raises the money for the factory and machinery, makes marks on file cards that will assist in efficient production or marketing, runs a machine that screws on bottle caps, or coordinates all these activities. Each man is producing wealth, which, come payday, will be translated into the more universal and generally useful form of wealth which is money.

There is no "problem of distribution" or "evil" here, since each man produces his own wealth to the extent of his ability and his willingness to make the effort of using that ability. On the contrary, evil enters the picture only when one starts thinking in terms of "distribution," for there is nothing to distribute save that which one takes away from those who have produced it and who therefore have an unalienable right to it.

And what is poverty, anyway? Mr. Kennedy tells us that one fifth of the population of this country lives in poverty. But poverty is a relative term. Wherever you have a society in which some individuals have more wealth than others, those who have the least will be called poor. But half the people in the world would consider themselves rich beyind their wildest dreams if they could only move into one of New York's dreariest slums, and Mr. Kennedy would probably consider himself poverty-stricken indeed if he had to live on the salary of even a very well-paid secretary.

Furthermore, cash income is hardly the only thing to consider. As has often been pointed out, many people in low income groups are not poor by their own standards. Many of the "one fifth" are elderly people whose cash income is fairly small, but who own homes and can therefore live comfortably on much less than people with rent to pay.

Many people do not choose to make money, and there are a variety of perfectly good reasons. People with long-range career goals very often work part-time to earn just enough for bare subsistence so that they can study their chosen profession on a full-time basis. Internship is one of the lowest paying jobs around, but one cannot become a doctor without spending one or two years as an intern--and there are other jobs and professions in which apprenticeship is necessary but not well-paid.

Some people do not chose to make more money because to do so, they would have to invest more time and more effort and accept more responsibility than they are willing to do. Others simply do not value a higher standard of living enough to change their present mode of life. There are many people in "blighted" areas who could move to areas in which their skills would command a higher income, but prefer to stay where they are. There are people who could retrain themselves for better-paying jobs, but prefer to stay with the jobs they have. There are people who seem to prefer squalor

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--the type who turn a sparkling new housing project into a filthy slum in a year's time. For that matter, many churches cannot or will not pay their clergy a living wage.

(This is not to say that all these people admit to being satisfied--many do complain bitterly and ask for help. But is it fair to regard people who live in poverty and/or squalor because of choices they have made and could change in the same light as those who literally cannot help themselves? I don't think so.)

As I said--what does he mean by poverty? The self-chosen lack of cash?

"It has been suggested that somehow a public accommodations statute might interfere with private property rights. However, this is not really a valid argument. Thirty-two states already have laws banning discrimination in business establishments and most of these laws are far more encompassing and far more stringent than the legislation we have suggested." (The legislation referred to is Title II of the Civil Rights Act of 1964.)

In law, and Mr. Kennedy is a lawyer, it is common practice to reason from precedents. This is quite valid when the precedents are properly used. A good precedent is a clear concretization of the relevent law. A law, in turn, is a means of applying abstract political principles to narrower and more specific instances than principles properly deal with. Principles, political or otherwise, do not depend for their validity on who did what to whom in what century. On the contrary, precedents depend for their validity on the accuracy with which they illustrate the law, and the law in turn depends for its validity on the accuracy with which it embodies the political principle. This is one of the reasons we have a Supreme Court--to decide whether or not the laws in the cases which come before it do embody the principles set forth in our Constitution (or at least do not conflict with those principles).

This can hardly be any real surprise to Mr. Kennedy. I am sure he would see the flaw immediately if we applied his method to a slightly different concrete: "It has been suggested that a federal segregation statute might interfere improperly with the civil rights of those segregated under it. However, this is not really a valid argument. Thirty-two states already have laws banning integration, and most of these laws are far more encompassing and far more stringent than the legislation we have suggested. "

One chapter is devoted to "White-Collar Crimes." More specifically to violations of antitrust legislation. He considers that the antitrust laws are not so difficult to interpret as some people claim. "We are talking about clear questions of right and wrong." "A conspiracy to fix prices or rig bids is simply economic racketeering, and the persons involved should be subject to as severe punishment as the courts deem appropriate." "[Such a person] is the enemy... because he is stealing."

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It would be interesting to know what he is stealing. When a man (or a company) produces a product, does it not belong to him? Doesn't he have the right to charge what he wants for it, whether he decides the price independently or in agreement with others? Evidently he sometimes does. Notice that when the product is manual labor, and the individuals are union members, Mr. Kennedy does not seem to consider the issue of price-fixing important enough to mention.

However, what is more important is the fact that, under existing antitrust legislation, there are conflicting laws that cannot possibly all be obeyed at the same time, and that Mr. Kennedy cannot avoid knowing this. It is illegal to price a product significantly lower than a competitor, even if the only reason you do so is because you can afford to charge less and he can't—and even if the only way to avoid charging less is by conspiring to fix prices. Mr. Kennedy can hardly be unaware of the antitrust legislation against "monopolistic practices." Yet he does not mention them. Perhaps because, if the two types of case were laid out side by side on a page, reason alone would not be enough to convince anyone that there wasn't something seriously amiss with the whole concept of antitrust.

There are numerous other examples of Mr. Kennedy's approach to the issues and the problems of the day, some great, some small, some sophisticated, some obvious. I think I can safely say that by the time you put this book down, you know why Mr. Kennedy believes that reason is not enough of a weapon with which to combat irrationality...or anything else.

There is very little that is new in this book, either by way of ideas or by way of approach. The approach, the method of dealing with ideas, has been dominant on our political scene (even more than the ideas themselves) for quite some time.

Forget any disagreement you may have with the ideas for the moment. Assume that everything Mr. Kennedy advocates is absolutely right. From the methods he uses in explicating and justifying them, would you really be able to tell why they were right? Would you even be able to tell if they were right? Would you be able to practice them correctly? Could you defend them even against the most blatant irrationality?

Most people will be reasonable about most things, if they are allowed to see what is reasonable and what isn't. Most people will try to do the right thing, if they are allowed the means to figure out what is right and what is wrong. It was on these assumptions that our Founding Fathers justified the whole concept of universal freedom. And our history is an eloquent demonstration that they were right.

Perhaps what we need more of in politics today are people who believe that reason is enough.

—Avis Brisk

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P E R S U A S I O N

GUILTY UNTIL PROVEN GUILTY

It is sometimes hard to figure out just whom a federal agency is supposed to be protecting: Take the Security and Exchange Commission (SEC), for example. A naive observer might think that a Commission was formed by the federal government to protect the process of investing and liquifying capital from certain kinds of fraud.

But what has been happening in recent cases, particularly the Texas Gulf Sulphur case, leads one to wonder if the purpose of the SEC might not be to make sure that the people who would like to own a company (that is, to buy stock in it) are treated preferentially by the management over the people who do own the company (that is, the present stockholders).

The Texas Gulf Sulphur Company is a company whose business is mining. Mining requires exploring, acquiring mineral rights, obtaining options to buy property, drilling evaluation holes, exercising options, and finally, going into mining production. It seems obvious that if a large company publicly announces that it is interested in the mineral rights in a certain area, that option prices in that area will go up. It seems obvious that to option an area large enough to go into full-scale mining operations (in the event of a strike) before drilling evaluation holes is a waste of stockholders' money. It seems obvious that the only alternative to these procedures is to move with extreme secrecy until evaluations have been completed. But not to the SEC.

The SEC claims that Texas Gulf Sulphur was being misleading when it made a public statement on April 12 (summarized in the New York Herald Tribune, April 13, 1964): "Texas Gulf Sulphur Company yesterday said recent mineral exploratory activity near Timmins, Ontario, has provided preliminary favorable results, sufficient at least to require a step-up in drilling operations." Three holes had been drilled by that date, according to Texas Gulf Sulphur's answer to the SEC. "They did not provide sufficient additional information upon which reasonable and logical conclusions could be based as to the nature and extent of mineralization," states the answer. By April 15, three more holes had been drilled, and it was concluded that the company had made a major strike, and discovered what a Texas Gulf Sulphur press release called "a mineable body of approximately 25 million tons."

Then the trouble began. The SEC filed suit against the company, charging that the actions of the company were "false and misleading" and that key people within the company had profiteered. This suit was based on SEC rule 10B-5, which was described by Burt Schorr in the Wall Street Journal of July 14, 1965, as follows: "that sweeping provision makes it unlawful for any person to mislead or defraud another in a securities transaction by 'any untrue statement' or omission of 'material fact.'"

Encouraged by this SEC action, former stockholders are filing damage suits based on the same SEC ruling. At least 16 such suits were filed between April and July of this year. Mr. Schorr quotes an attorney for one of these former stockholders as saying that rule 10B-5 is cited in his suit because it "substantially eases the burden of proof required of a seller plaintiff while imposing a heavier burden on the

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defendant than exists in common law."

This lawyer's client is suing not only Texas Gulf Sulphur, but also a local brokerage firm which, according to Mr. Schorr's article, "supposedly advised that she sell her 20 shares at $33.50 each; the stock hit a high of $71.25 earlier this year."

In other words, companies had better not be right, and brokers had better not be wrong.

But could it be possible that the SEC really holds that the interest of those stockholders who do not sell their stock should be subordinated to the interest of those who become discouraged and do sell --or even of those who might have wished to buy, had they only known?

Well, Mr. Schorr has one final quote that bears on this question. It is from an article in last year's Northwestern Law Review, by Michael Joseph, "a member of the SEC legal staff." Mr. Joseph was addressing himself to the complaint that under 10B-5 it seemed to be implied that it was no longer necessary to trace any connection between a loss incurred by any buyer or seller and an official of a company who bought or sold his own stock, in order to hold that official liable for damages.

Mr. Joseph is quoted as saying that this should be no problem to any company official--he need only be sure that the public knows everything he knows which might be relevant. "The need for disclosure to public investors of facts material to their investment decisions outweighs any harm to the company that might result from such disclosure."

If a private individual hired an agent to do some prospecting, he would be understandably cross if in order to be "fair" the agent insisted on announcing around town any information he possessed, whether or not it did any harm to his employer. But that's not the rules they play by down at the SEC.

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